

ATTACHMENT 63

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE: DA VINCI SURGICAL)
ROBOT ANTITRUST LITIGATION)Lead Case No.
)3:21-cv-03825-VC
)
THIS DOCUMENT RELATES TO ALL)
CASES)
)
)
SURGICAL INSTRUMENT SERVICE)Case No.
COMPANY, INC.,)3:21-cv-03496-VC
)
Plaintiff,)
)
v.)
)
)
INTUITIVE SURGICAL, INC.,)
Defendants.)
)

REMOTE VIDEO RECORDED DEPOSITION OF
MICHAEL BURKE, M.D.
Tuesday, September 27, 2022

REPORTED BY: RENEE HARRIS, CSR, CCR, RPR
JOB NO. 5490765
PAGES: 1 - 146

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1 A. No.

2 Q. Have you ever discussed the lawsuit with
3 colleagues of yours?

4 A. No.

5 Q. Dr. Burke, when did you first join Valley 09:16:10
6 Medical?

7 A. August of 1984.

8 Q. And at some point, you became the
9 chairman of the department of surgery; correct?

10 A. A couple of times, actually, yeah. 09:16:25

11 Q. When did you first become chairman of the
12 department of surgery at Valley?

13 A. 1988.

14 Q. And if I refer to Valley Medical Center
15 as "Valley," will you understand what I'm talking 09:16:44
16 about?

17 A. Yes.

18 Q. That's the hospital where you were
19 employed for a number of years?

20 A. Correct. 09:16:52

21 Q. So you first became chairman of the
22 department of surgery at Valley in 1988; how long
23 did you remain the chairman?

24 A. It was a two-year term, I think. Yeah.

25 Q. And you said you became the chairman of 09:17:14

1 the department of surgery again at some point;
2 correct?

3 A. Yes, in I think 2002.

4 Q. And how long did you remain chairman at
5 that point? 09:17:25

6 A. Until I retired in January.

7 Q. And you retired in January of 2022?

8 A. Correct.

9 Q. So you were the chairman of the
10 department of surgery at Valley Medical for 09:17:44
11 approximately 20 years?

12 A. That's correct.

13 Q. What responsibilities did you have as the
14 director of -- or as the chairman of the
15 department of surgery? 09:18:06

16 A. Well, it's kind of a -- we have monthly
17 meetings to inform the staff of operations in the
18 hospital, and it was pretty broad from the
19 standpoint of what we covered in those meetings.

20 We did not involve issues with gynecology 09:18:27
21 or orthopaedics as they had their own
22 subdivisions.

23 Q. And who ran the gynecological
24 subdivision?

25 A. Over what period of time? I mean, 09:18:51

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1 Mischaracterizes testimony.

2 THE WITNESS: It depends on the
3 procedure, I guess. We had a lot of
4 procedures that they were more complex;
5 sometimes you had to do them open. Or if you 09:49:51
6 had a previous surgery where access would be
7 challenging, then you would do the procedure
8 open.

9 BY MS. CAHOY:

10 Q. I believe you testified previously that 09:50:24
11 you were involved in developing the credentials
12 for robotic privileges; is that correct?

13 A. Correct.

14 Q. Was it a requirement of the hospital that
15 surgeons with robotic privileges also have 09:50:34
16 privileges to perform the basic procedure, either
17 open or laparoscopically?

18 A. Yes.

19 Q. And why did the hospital have that
20 requirement to -- to your knowledge? 09:50:49

21 A. Well, if the procedure runs into
22 complications, you have to open the patient and
23 complete the procedure. So the answer is you have
24 to be trained on how to handle a potential
25 complication. 09:51:05

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1 Q. Why would a surgeon need to have
2 credentials to perform the basic procedure
3 laparoscopically?

4 A. For the same reasons.

5 Q. Are there any other reasons that -- that 09:51:18
6 you considered it important that surgeons have
7 privileges to perform the basic procedure, either
8 open or laparoscopically?

9 A. I think the foundation of any surgical
10 procedure is the capability to do it open. So 09:51:52
11 that if you deploy any minimally invasive
12 protocol, whether it's laparoscopic or robotics,
13 that your fallback position is that you can do it
14 open.

15 MS. CAHOY: So I -- let's pull up Tab 09:52:19
16 20 -- or Tab 55. And I believe we're
17 starting here with defense Exhibit 49.

18 So if we could -- Paul, if you could
19 please mark Tab 55 as defense Exhibit 49.

20 (Exhibit 49 was received and marked 09:52:43
21 for identification on this date and is
22 attached hereto.)

23 BY MS. CAHOY:

24 Q. And, Dr. Burke, you may need to refresh
25 your screen as soon as Paul gets this uploaded so 09:52:52

1 A. The ports were a little bit larger, the
2 -- which required a different instrument through
3 each of the arms, so we'd have to have stock of
4 all of that equipment.

5 Q. You said earlier that you were advocating 10:22:08
6 for the purchase of an Xi; correct?

7 A. Yes.

8 Q. Why did you want the hospital to purchase
9 an Xi?

10 A. At that time, I thought that the advances 10:22:24
11 in the technology had improved enough to warrant
12 another robot, plus we had -- our Si was probably
13 the oldest one in the State of Washington.

14 Q. And you said the advances in the
15 technology had improved. What are examples of 10:22:44
16 ways in which you thought the technology had
17 improved in the Xi, as compared to the Si?

18 MR. BATEMAN: Objection.
19 Mischaracterizes testimony.

20 THE WITNESS: Well, we had better 10:23:03
21 articulating instrumentation. We had vessel
22 sealers that were an improvement. Eventually
23 staplers came online, articulating staplers.
24 Over the course of the process, they were all
25 more valuable. 10:23:25

1 will not serve anyone's interest. To be clear,
2 I'm in complete agreement that we need a second Xi
3 robot to maintain our growth and offer the
4 services to all that we invest in. There is no
5 argument that the Xi is more capable, modern and 11:34:40
6 efficient machine than the Si. Of course we are
7 open to feedback on how to improve operational
8 oversight of our growing robotic program, and
9 several of our points below are valid and we are
10 actively working on them." 11:35:03

11 Q. So everyone on this e-mail chain thus far
12 was in complete agreement that the hospital needed
13 a second Xi robot; correct?

14 A. Yes.

15 Q. And you also agreed with that conclusion? 11:35:15

16 A. Yes.

17 Q. Do you agree with Mr. Wagner that the Xi
18 is a more capable, modern and efficient machine
19 than the Si?

20 A. I think the equipment that was utilized 11:35:28
21 with the Xi afforded more capability to do
22 operations that were slightly more complex.

23 Q. And what sorts of capabilities did the Xi
24 offer that the Si did not?

25 A. Well, we had -- in the end, we had 11:35:55

1 automatic staplers. We had vessel-sealing
2 capabilities. Better articulation. More chances
3 to move the camera around to different ports. I
4 mean, a number of areas that, you know -- it
5 avoided redocking of the robot if you're doing a 11:36:14
6 more complicated procedure.

7 Q. And it avoided redocking because there
8 was another arm?

9 A. Another port you could put the camera in
10 because the port for the camera was the same size 11:36:35
11 as the operating instruments.

12 Q. And in the last paragraph there,
13 Mr. Wagner is updating you on funding and timing,
14 which he describes as the real issue for acquiring
15 the second Xi robot; correct? 11:37:00

16 A. Yes.

17 Q. In the next e-mail, Dr. Bernier responds
18 so the tame thread on August 21st, 2019; correct?

19 A. Which page does that e-mail start on; do
20 you know? 11:37:35

21 Q. 14376. Looking at the one that says,
22 "From: Greta Bernier."

23 A. Yes, I have that. Okay.

24 Q. And Dr. Bernier sent that e-mail on
25 August 21st, 2019; correct? 11:37:52

1 payment on -- on purchasing a robot or something
2 along those lines, but I'm not -- I don't know the
3 specifics of it.

4 Q. But there were negotiations going on with
5 Intuitive about -- some back-and-forth 11:54:56
6 negotiations about how to finance the purchase?

7 A. Yes.

8 Q. And then the next sentence says, "We can
9 do a Peer Review meeting but it seems to be going
10 OK." 11:55:10

11 What does that mean?

12 A. That's a totally different topic,
13 actually. Peer review is more about complications
14 in surgery, and it would encompass any of the
15 divisions of surgery. 11:55:20

16 Q. So why were you writing about peer review
17 in this e-mail?

18 A. I don't know. It probably was bugging me
19 on that topic at the time.

20 Q. And when you said, "...but it seems to be 11:55:36
21 going OK," did you mean that you weren't seeing
22 increased complications with the robot as compared
23 to other modalities?

24 A. I don't think it was related to the
25 robot, to be honest with you. 11:55:51

1 page.

2 A. Okay.

3 Q. So on that very first page, the one
4 marked -- that has page 15993 at the bottom, do
5 you recognize this document?

12:01:20

6 A. No.

7 Q. At the top of the document it says, it's
8 from January Wagner to Michael Burke; correct?

9 A. Correct.

10 Q. And that's your name and e-mail address
11 in the to-line?

12:01:34

12 A. Yes.

13 Q. And on the date, it says it was sent on
14 August 23rd, 2018.

15 A. Yes.

12:01:45

16 Q. Do you have any reason to believe that
17 you didn't receive this e-mail --

18 A. I'm sure -- I'm sure I did receive this.

19 Q. And John Wagner writes to you, "We should
20 know soon. There is still significant cost
21 savings on the table. I am pushing to get this
22 done. Hang in there..."

12:02:04

23 Do you see that?

24 A. Yes.

25 Q. Was he providing you with an update on

12:02:20

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1 the status of the negotiations for the new robot?

2 A. Yes.

3 Q. And he was telling you there was still
4 significant cost savings on the table and that he
5 was pushing to get it done; right?

12:02:28

6 A. Correct.

7 Q. What did he mean by that?

8 A. We thought that he could possibly
9 expedite us getting a new robot. That's all.

10 Q. And there were cost savings to the
11 hospital with -- on the table if it expedited
12 purchasing the robot?

12:02:45

13 A. Yes.

14 Q. And that was because Valley Medical was
15 going to get a larger discount if it purchased the
16 robot now, at the same time as another hospital?

12:03:00

17 MR. BATEMAN: Objection. Vague.

18 THE WITNESS: Yeah, I don't know -- you
19 know, I wasn't involved in that.

20 BY MS. CAHOY:

12:03:18

21 Q. But at this time, Mr. Wagner was still
22 negotiating with Intuitive about the terms of the
23 purchase of a new Xi?

24 A. I'm not sure he had the -- as much as he
25 had the discussions, he wasn't the decision-maker

12:03:39

1 on them.

2 Q. But he was the one who had the
3 discussions with Intuitive negotiating the
4 purchase?

5 A. I don't know that specifically. 12:03:53

6 Q. But he was providing you with updates on
7 how those negotiations were going?

8 A. Yes.

9 Q. Did you follow up with him to ask about
10 the status of -- of the negotiations after this? 12:04:03

11 A. I don't recall the specifics of it if I
12 did, but I more than likely did.

13 Q. Did Intuitive ultimately provide
14 discounts to Valley Medical on the purchase of the
15 new Xi? 12:04:24

16 A. I don't know -- I don't know that.

17 Q. Who is the person who would know that at
18 Valley Medical?

19 A. Jeannine -- the finance people would
20 know, Jeannine Grinnell. 12:04:34

21 Q. Jeannine Grinnell you said -- oh,
22 Grinnell. Grinnell.

23 A. Jeannine Grinnell, yeah.

24 Q. Who at the time was the CFO?

25 A. No. She was the chief financial -- yes, 12:04:46

1 STATE OF CALIFORNIA)

2 (Ss.

3 COUNTY OF LOS ANGELES)

4 I, RENEE HARRIS, do hereby certify that I
5 am a licensed Certified Shorthand Reporter, duly
6 qualified and certified as such by the State of
7 California;

8 That prior to being examined, the witness named
9 in the foregoing deposition was by me duly sworn
10 to testify to tell the truth, the whole truth, and
11 nothing but the truth;

12 That the said deposition was by me recorded
13 stenographically;

14 And the foregoing pages constitute a full,
15 true, complete and correct record of the testimony
16 given by the said witness;

17 That I am a disinterested person, not
18 being in any way interested in the outcome of said
19 action, or connected with, nor related to any of
20 the parties in said action, or to their respective
21 counsel, in any manner whatsoever.

22 DATED: October 12, 2022

23



24

Renee Harris, CSR, CCR, RPR

CA CSR No. 14168,

25

NJ CRR No. 30XI00241200; RPR